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No. 97-55

In the
Supreme Court of the United States
October Term, 1997

FRANK KEATING, GOVERNOR, OF THE STATE OF OKLAHOMA AND KEN FEAGINS, A NONRESIDENT INDIVIDUAL,

Petitioners,

v.

STATE OF OKLAHOMA, EX REL., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA-DIVISION NO. 1

BRIEF IN OPPOSITION

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Like the Federal government and many of its sister states, Oklahoma has a progressive income tax system under which the taxes paid by an individual is based, to some extent, upon the individual's ability to pay. Oklahoma like its sister states only taxes the income earned within the state. Petitioner in this case has raised the following question related to Oklahoma's progressive income tax system:

QUESTION PRESENTED

Does a state law for taxation of income of a nonresident, which only taxes income earned from within the state, violate the Due Process Clause when the state law applies the same income tax calculation, taking into account all federally recognized deductions and exemptions to residents and nonresidents alike and then allow the nonresident to apply the rate so calculated to only that income earned within the state?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of the State of Oklahoma Division No. 1 of which Petitioners seek review, was rendered sub nomine ***David Walters v. State of Oklahoma, ex rel., Oklahoma Tax Commission*** and is reported at 935 P.2d 398 (Okla. Ct. App. 1996).

STATEMENT OF THE CASE

Petitioner (Plaintiff below) initially brought this action in state district court raising several state and federal constitutional claims. Petitioner sought declaratory relief that Section 27 of Senate Bill 1121, Okla. Stat. tit. 68 § 2362 (1994), of the 1994 Oklahoma Legislative Session which amended Section 2362 of the Oklahoma Income Tax Code was unconstitutional, both as to its enactment and the effect of the law. Petitioner here seeks only review pursuant to the Due Process Clause.

On cross-motions for summary judgment, the trial court rendered judgment for Respondent (State) on all counts.

On appeal, the Court of Appeals of the State of Oklahoma Division No. 1 affirmed the trial court's judgment for State on all counts. Petitioner sought review of the Court of Appeals decision by the Oklahoma Supreme Court by a petition for writ of certiorari. The Oklahoma Supreme Court denied Petitioner's petition for writ of certiorari.

Petitioner has conceded two (2) important points in his petition before this Court:

1. Under Okla. Stat. tit. 68 § 2362 (1994) a nonresident's tax liability is based upon the percentage of their income earned in Oklahoma. (See Petitioner's Petition for Writ of Certiorari, page 5.)

2. Okla. Stat. tit. 68 § 2362 (1994) not only caused some nonresident's Oklahoma tax liability to increase but also caused some nonresident's Oklahoma tax liability to decrease. (See Petitioner's Petition for Writ of Certiorari, page 5.)

As will be shown, the decision of the trial court and the Court of Appeals are consistent with applicable decisions of this Court,

and do not conflict with any federal law or with the applicable decisions of the highest courts of other states. Review by certiorari is unwarranted, and should be denied.[1]

REASONS FOR DENYING THE WRIT

PETITIONER'S WRIT SHOULD BE DENIED BECAUSE:

1. THE ISSUE PRESENTED BY PETITIONER HAS BEEN SETTLED BY THIS COURT.

2. THERE IS NO CONFLICT AMONG THE STATE OR FEDERAL COURTS ON PETITIONER'S ISSUE. THE SEVERAL STATE COURTS AND ONE FEDERAL COURT THAT HAVE REVIEWED PETITIONER'S ISSUE HAVE ALL FOLLOWED THIS COURT'S PRECEDENT.

3. OKLAHOMA'S TAXING LAW IS CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S PRECEDENT.

a. Oklahoma's Progressive Income Tax Law is constitutionally permissible.

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[1] This Court recently granted certiorari in a case in which nonresidents of New York are not allowed to deduct a proportionate share of their federal alimony deduction for New York state income tax purposes, ***Lunding v Appeals Tribunal***, 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996). The Oklahoma nonresident income tax statute is markedly different from the New York nonresident income tax code. **Under Oklahoma law a nonresident is allowed to take a prorated share of their federally allowed deductions based upon the percentage their Oklahoma income is to their total Federal income.**

Like the Federal government and many of its sister states, Oklahoma has a progressive income tax system under which the taxes paid by an individual is based, to some extent, upon the individual's ability to pay. Under a progressive system, the taxes paid by an individual increase as the individual's income increases. Thus, under a progressive tax system, the tax rate of an individual who makes $50,000.00 a year is higher than that of a citizen who makes $5,000.00.

The challenged tax law, Okla. Stat. tit. 68 § 2362 (1994), corrected an inequity in Oklahoma's progressive income tax system -- an inequity under which nonresidents were afforded preferential treatment. Under the preferential system, the out of state income of nonresidents was virtually ignored in calculating the tax rate on Oklahoma income.

For example, under the prior tax law, a nonresident taxpayer with an income of $50,000.00, who earned $1,000.00 in Oklahoma, would have his tax liability calculated under a system that would presume his total income (his total ability to pay) was $1,000.00. Theoretically, under such a system, if all fifty states had similar income tax rates, an individual who earned $50,000.00 a year -- $1,000.00 in each state -- would have little or no state income tax liability at all.

To correct the inequity in the progressive tax system that existed because of the preferential treatment of nonresidents, the Legislature modified the method of computing Oklahoma income taxes for nonresidents by determining the Oklahoma tax rate on the basis of the total income, and then applying it to the percentage of their total income earned in Oklahoma. The amendment, designed to bring more equity to Oklahoma's progressive income tax system, insured that nonresidents, like resident taxpayers, have the taxes on their Oklahoma income calculated on the basis, to some extent, of their ability to pay. The amendment

also insured that Oklahoma only taxed income earned in Oklahoma – no out of state income is taxed by Oklahoma.

All taxpayers are now treated equally.

Under the amendment, the tax paid on Oklahoma income by both (a) residents and (b) nonresidents is calculated using the same formula:

(1) The tax rate for both is based upon the taxpayer's total income.

(2) The tax liability for both is based upon the percentage of their income earned in Oklahoma.

b. Oklahoma's amendment is constitutionally permissible under this Court's precedent.

The gravamen of Petitioners complaint is that the Oklahoma progressive tax rate - not tax liability - considers taxpayers total income (ability to pay). The appropriateness of a progressive tax rate has been well established by this Court. See ***Brushaber v. Union Pac. R.R.***, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1915).

The inclusion in a state taxing scheme of property not subject to direct taxation by the state, for the purpose of determining the **rate of taxation** to be applied to property that is subject to the state's taxing power, is constitutionally permissible. ***Atlantic and Pac. Tea Co. v. Gorsjean***, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937); ***Maxwell v. Bugbee***, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed 1124 (1919). In ***Maxwell*** this Court reviewed a New Jersey inheritance tax that required the inclusion of the entire estate of the decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey inheritance tax was calculated, as is done by Section 27 of

Senate Bill 1121, by applying the rate applicable to the entire estate, including property located outside of New Jersey, but then reducing the tax to reflect only the percentage of the estate located in New Jersey. This Court in ***Maxwell*** held that:

> "[T]he subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed * * * In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent * * * It is in no just sense a tax upon the foreign property." (*Id.*, at 539, 40 S.Ct. at 6.) (Emphasis added.)

Since this Court's decision in ***Maxwell*** and ***Grosjean***, every high court in the states that have considered Petitioner's issue have upheld their state's tax treatment of nonresident income. See ***Matteson v. Director of Revenue, State of Missouri***, 909 S.W.2d 356 (Mo. 1995) (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Brady v. State***, 607 N.E.2d 1060 (N.Y. Ct. App. 1992) (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Stevens V. State Tax Assessor***, 571 A.2d 1195 (1990), *cert. denied*, 498 U.S. 819, 111 S.Ct. 65, L.Ed.2d 40 (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Wheeler v. State***, 127 Vt. 361, 249 A.2d 887 (1969) (upholding validity of including nonresident income — which was not taxable by State — in determining State tax rate); ***United States v. State of Kansas***, 810 F.2d 935 (10th Cir.)(1987) (upholding validity of including nonresident military income — which was not taxable by State — in determining State tax rate);

Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468 (1988) (upholding requirement that nonresident taxpayer reduce net operating loss from North Carolina partnership by amount of out-of-state income), *cert. denied* 489 U.S. 1096, 109 S.Ct. 1568, 103 L.Ed.2d 935 (1989).

In the present case the Oklahoma court followed the holding of this Court in ***Maxwell*** by finding that:

> "Use of out-of-state income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income." ***Walters, et.al., v. State of Oklahoma, ex rel. Oklahoma Tax Comm'n.***, 935 P.2d 398 (Okla. App. 1996).

> **c. Over the past twenty-six (26) years only six courts have been called on to decide the issue presented by Petitioner in this case. In each and every case the courts have followed the settled federal law.**

Petitioner argues that the decision below represents a decision that is not based on settled Federal Law and that this Court needs to grant Certiorari to settle this important federal question. The Petitioner begrudgingly recognizes this Court's holding in ***Maxwell*** and offers little but personal disagreement with that decision in support of his petition. This Court settled the very issue Petitioner presents here in ***Maxwell*** when the Court stated:

> "When the state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court." (*Id.* 539, 40 S.Ct. at 6.)

The sole issue in this case is whether a state can include property not subject to taxation within the state as a measure of the tax rate. This Court decided that issue in the *Maxwell* case. The challenged Oklahoma statute does not tax property without the state, only income within, and only refers to out-of-state income as a means of establishing a tax rate. That progressive tax rate is established, in part, by determining the taxpayer's ability to pay; that determination is based upon the total income of the taxpayer. The challenged statute brings equity to Oklahoma's progressive income tax system by placing nonresidents and residents on a more equal footing in regards to the tax rate their Oklahoma income is taxed at.

d. The issue in the present case has not been a continuing source of controversy and litigation in both state and federal courts. Accordingly courts do not need guidance in this area.

Petitioner further argues that this Court should grant certiorari in this case because the issue present in this case has "been a continuing source of controversy and litigation in both state and federal courts." and therefore this Court needs to step in and settle the issue. The Petitioner has cited five (5) state cases and one (1) federal case dealing with the issue at controversy in this case. These six (6) cases were spread out over a twenty-six (26) year period. What the Petitioner fails to mention is that in each and every case the courts all reached the same conclusion, which is that this area of the law was settled by this Court with the *Maxwell* case.

CONCLUSION

The decision below is correct and squarely on point with the decisions of this Court and those of other state courts of last resort

that have addressed this issue. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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